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No. 88-948

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE CITY OF BRUNSWICK GEORGIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the net worth of a unit of local government is calculated by subtracting total liabilities from total assets in determining eligibility for awards under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(2)(B) (Supp. IV 1986).

2. Whether the government's position was substantially justified within the meaning of the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A) (Supp. IV 1986).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Anderson v. *City of Bessemer*, 470 U.S. 564 (1985)	8
Pierce v. *Underwood*, No. 86-1512 (June 27, 1988)	6, 10, 11, 12
Ruckelshaus v. *Sierra Club*, 463 U.S. 680 (1983)	10
Russell v. *National Mediation Board*, 775 F.2d 1284 (5th Cir. 1985)	12
United States v. *Estridge*, 797 F.2d 1454 (8th Cir. 1986)	13

Statutes and regulation:

Equal Access to Justice Act:	
28 U.S.C. 2412(d)(1)(A) (Supp. IV 1986)	5
28 U.S.C. 2412(d)(2)(B) (Supp. IV 1986)	5
42 U.S.C. 4001 *et seq.*	2
42 U.S.C. 4104(g)	3, 4
44 C.F.R. 59.1	2

Miscellaneous:

H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980)	9
S. Rep. No. 253, 96th Cong., 1st Sess. (1979)	9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 849 F.2d 501. The opinion of the district court (Pet. App. 15-52) is reported at 661 F. Supp. 1431.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1988 (Pet. App. 53-54). Rehearing was denied on September 7, 1988 (Pet. App. 55-56). The petition for a writ of certiorari was filed on December 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has established a program of federally subsidized flood insurance, known as the National Flood

Insurance Program, for communities that carefully control the development of land historically likely to be subject to floods. 42 U.S.C. 4001 *et seq.*; Pet. App. 16. Petitioner applied to be included in that program, and the Federal Emergency Management Agency (FEMA) employed a private engineering firm—Camp, Dresser & McKee (CDM)—to perform a flood insurance study (FIS)[1] for Brunswick and the surrounding tri-county area (Pet. App. 16-17). CDM was also directed to create a flood insurance rate map (FIRM)[2] (*id.* at 17-18). In July 1982, petitioner was given copies of the FIS and the draft FIRM for its information and review (*id.* at 7). These documents notified petitioner of the proposed base flood elevations (BFE)[3] and were published in *The Brunswick News* on August 25, 1983, and September 1, 1983 (*ibid.*).

Petitioner, in a joint appeal with Glynn County, Georgia, objected to certain aspects of the draft FIRM, and on November 1, 1984, FEMA informed petitioner that some modifications had been made in light of those objections (Pet. App. 7-8). FEMA enclosed a revised FIRM and stated that petitioner had thirty days to review

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[1] "The purpose of the FIS is to identify 'flood plains,' such as 'coastal areas in the United States which have special flood hazards,' and to establish 'flood risk zones' and make 'estimates with regard to probable flood-caused loss' for such zones" (Pet. App. 17).

[2] A flood insurance rate map is created from the results of the flood insurance study. It is an official map of the community, delineating the "special hazard areas and the risk premium zones applicable to the community" (44 C.F.R. 59.1).

[3] "The BFE is the estimated water level of a 'flood having a one percent chance of being equaled or exceeded in any given year'. [Accordingly, it] affects both the insurance rates to be charged and the permissible types of construction in flood-risk zones" (Pet. App. 7).

and comment on the attached maps (*ibid.*). Petitioner did not submit additional scientific or technical data (*ibid.*).

On December 19, 1984, FEMA notified petitioner that the final FIRM would go into effect on June 19, 1985, and that petitioner had six months to adopt ordinances meeting minimum safety standards required for eligibility for subsidized insurance (Pet. App. 8). By statute, petitioner had 60 days from the date of this notice to seek judicial review of FEMA's final determination (*id.* at 9; 42 U.S.C. 4104(g)). Petitioner did not seek such review within that time. Indeed, it did not even respond to FEMA until May 1, 1985. Pet. App. 9. In its response, petitioner sought a nine-month extension of the FIRM's effective date, claimed that the FIS was technically deficient, and asserted that FEMA should have conducted an environmental impact statement (EIS) for the Brunswick area (*ibid.*). FEMA refused to grant the extension, stated that an EIS was not required, invited petitioner to submit additional flood data (which petitioner did), and declined to alter the FIS or FIRM (*ibid.*).

2. On July 16, 1985, petitioner filed suit in district court against FEMA seeking to enjoin FEMA from implementing the FIRM and requesting declaratory relief on the basis of the following contentions (Pet. App. 11):

> (1) that the proposed BFE's were inaccurate,
> (2) that FEMA was obligated to perform a site-specific EIS before implementing a FIRM,
> (3) that FEMA violated its own regulations by failing to conduct notice-and-comment rule making on the methodology to be used in performing the FIS, and
> (4) that FEMA unlawfully delegated critical fact-finding functions to a private entity (i.e., the private engineering firm) without exercising meaningful supervision over its work.

On January 9, 1986, the district court granted FEMA's motion for summary judgment on the claim seeking review of the proposed BFEs because FEMA had failed to comply with the sixty-day time limit of 42 U.S.C. 4104(g) (Pet. App. 19). The court, however, denied FEMA's motion for summary judgment with regard to the remainder of petitioner's complaint (*i.e.*, the allegations of procedural deficiencies), and directed that those claims be set for trial (*ibid.*).

Prior to trial, the parties reached a settlement agreement, which was approved by the district court on January 29, 1986 (Pet. App. 19). The settlement agreement, under which petitioner agreed to dismiss its action against FEMA with prejudice, provided that the parties would attempt to resolve the issues raised by petitioner regarding the performance of the flood insurance study and that any issue not resolved would be referred to a panel of expert arbitrators (*ibid.*). FEMA agreed to modify the FIRM if the arbitrators selected new BFEs; the modifications were to become effective by order of the district court (*id.* at 19-20). After the parties failed to resolve all of the issues, the arbitration panel considered petitioner's claims, and accepted some aspects of petitioner's position and rejected others. The arbitrators' report resulted in the reduction of the original BFEs, by, on average, only 1.7 feet (R6-159 Exh. B at 2). FEMA issued a new FIRM, which was made effective by the district court's order of October 30, 1986 (Pet. App. 21).

3. After entry of the October 30th order, petitioner sought $477,984.11 in costs, expenses, and attorneys' fees under a variety of statutes and equitable theories (Pet. App. 15). FEMA opposed the request. On May 20, 1987, the district court held that petitioner was entitled to attorneys' fees and expenses under the Equal Access to

Justice Act (EAJA) and awarded petitioner $312,876.10 for attorneys' fees and expenses and $11,616.05 for costs (Pet. App. 51). In making this award, the district court ruled on a number of issues concerning petitioner's eligibility for an award under EAJA. The only issues relevant at this stage are: (1) whether petitioner's net worth was in excess of the statutory limit for eligibility for awards under EAJA; and (2) whether the position of the United States was "substantially justified" so as to preclude an award under EAJA.

To be eligible for fees under EAJA, a unit of local government may not have a net worth in excess of $7 million at the time the action was filed. 28 U.S.C. 2412(d)(2)(B) (Supp. IV 1986). The United States, citing petitioner's Annual Financial Report showing a Total Municipal Equity in excess of $20 million, argued that petitioner's net worth exceeded the statutory limit. The district court rejected this argument, holding that calculation of petitioner's net worth should not include the net value of "restricted assets," *i.e.*, those assets reserved for a specific use by petitioner, such as for water utilities, parks, or government buildings (Pet. App. 31-33). The court stated that Congress intended the courts to focus "on actual *ability to pay*," and that only wholly unrestricted assets were available for the payment of attorneys' fees and expenses (*id.* at 32-33, emphasis in original). Applying that standard, the court ruled that petitioner's net worth did not exceed the statutory $7 million limit (*id.* at 33).

EAJA also precludes an award if the position of the government was "substantially justified." 28 U.S.C. 2412(d)(1)(A) (Supp. IV 1986). The district court required that the government's position be justified by "more than mere reasonableness" (Pet. App. 34). It focused its inquiry almost wholly on whether FEMA was substantially justi-

fied in promulgating the flood insurance study (*id.* at 34-39). The district court concluded (*id.* at 37) that the arbitrators had found "unreasonable errors" in the FIS and held that the government's position, for that reason, was not substantially justified (*id.* at 38).

4. The court of appeals reversed the district court's award on alternative and independent grounds. First, the court held that the district court had erred in interpreting the statutory net worth limitation. It concluded (Pet. App. 4) that the district court erroneously excluded restricted assets from the net worth calculation on the ground that it should independently focus on petitioner's ability to pay attorneys' fees. The court of appeals ruled (*ibid.*) that the $7 million limit set in the statute represented "Congress' concern with the 'ability to pay' factor," and that the district court erred in engrafting its own concerns about ability to pay onto the congressionally set limit. The court of appeals determined that the statutory net worth limit was to be calculated by subtracting total liabilities from total assets, as the legislative history indicated (*id.* at 3, 4), and that when restricted, as well as unrestricted, assets were included in the calculation, petitioner's net worth exceeded the $7 million limit (*id.* at 5). Accordingly, the court of appeals concluded (*ibid.*) that the statutory net worth limitation made petitioner ineligible for an award under the EAJA.

Second, ruling just a few days after this Court's decision in *Pierce* v. *Underwood,* No. 86-1512 (June 27, 1988), the court of appeals—like the district court—applied the now rejected "more than mere reasonableness" test to the issue of whether the government's position was substantially justified (compare Pet. App. 6 with *Underwood*, slip op. 10-14). Nevertheless, the court of appeals determined (Pet. App. 6) that the district court abused its discretion in rul-

ing that the position of the United States was not substantially justified. The court of appeals, unlike the district court, did not focus wholly on the accuracy of the flood insurance study in determining whether FEMA had been substantially justified. Rather, the court of appeals looked at the totality of the government's actions and positions in this case.

The court determined that the government's position at the agency level was substantially justified (Pet. App. 9). FEMA had followed the procedures outlined by the applicable statute, advised petitioner of the proposed BFEs, and informed petitioner that it had thirty days to respond to the ruling on the joint appeal of petitioner and Glynn County before the BFEs became final (*id.* at 9-10). When petitioner failed to respond within the thirty-day period and then failed again to seek judicial review within the statutory time period, FEMA was substantially justified in refusing to grant an extension of the FIRM's effective date and in refusing to modify the FIS (*id.* at 10).

The court of appeals also determined that the government's pre-stipulation litigation position was substantially justified (Pet. App. 11-12). The district court had granted, on timeliness grounds, the government's motion for summary judgment with regard to petitioner's claim that the FIS was inaccurate and had determined that the government's defense of the three claims regarding alleged procedural deficiencies was substantially justified. Petitioner did not challenge these rulings on appeal.

Finally, the court of appeals determined (Pet. App. 12-14) that the government's post-stipulation litigation position was also substantially justified. The court ruled that the district court abused its discretion by examining only the accuracy of the FIS, when it should have looked

at the position the government took before the arbitration panel (*id.* at 12, 14). The court of appeals reviewed the record and found (*id.* at 13-14) that the arbitrators had agreed with the government on several issues, while disagreeing in some respects on others. The court concluded that although the arbitration panel did not agree entirely with the government on all of the issues before it, the government's position before the arbitrators was substantially justified (*id.* at 14).

ARGUMENT

The ruling of the court of appeals that petitioner is ineligible for an award under EAJA is based on two independent grounds. Each ground is correct and neither conflicts with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The court of appeals determined that in calculating the net worth of a unit of local government under EAJA, total liabilities are subtracted from total assets, whether those assets are restricted or unrestricted. That conclusion, concerning a matter of first impression, was clearly correct.

The difference between the district court and the court of appeals over the application of EAJA's net worth limitation concerned a question of law:[4] whether Congress

[4] Petitioner's complaint (Pet. 8) that the court of appeals' ruling on this issue is inconsistent with *Anderson* v. *City of Bessemer*, 470 U.S. 564 (1985) (district court's findings of fact are not to be reversed unless they are clearly erroneous), is based on a misapprehension of the nature of the district court's determination. As the court of appeals' opinion makes clear, the difference between the district court's conclusion on this issue and that of the court of appeals is not over factual findings, but is purely a difference in statutory interpretation. Accordingly, petitioner's discussion (Pet. 9-11) of the differences between the testimony of experts who testified for the parties is irrelevant.

intended restricted assets (*i.e.*, assets reserved for a specific use such as water utilities, parks, or government buildings) to be included in a local government's net worth in determining whether it exceeded the net worth limitation. The district court's determination (Pet. App. 32-33) that restricted assets should not be included in the calculation was based on its conclusion that Congress intended the courts to engage in an independent assessment of the locality's ability to pay for litigation against the federal government. The district court reasoned that since many of petitioner's assets were restricted, they would not be available to pay attorneys' fees, and thus should not be included in the calculation of net worth.

The court of appeals, in contrast, concluded that Congress had itself made the ability to pay determination when it established the $7 million limitation. Although EAJA does not define the term "net worth," the court of appeals noted (Pet. App. 3, 4) that the accompanying committee reports state that net worth is "calculated by subtracting total liabilities from total assets." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15 (1980); S. Rep. No. 253, 96th Cong., 1st Sess. 17 (1979).[5] Thus, the court of appeals concluded that Congress intended courts to determine eligibility for an EAJA award simply by subtracting total liabilities from total assets, and not to engage in an independent analysis of the availability of different types of local government assets for underwriting litigation.

The court of appeals' ruling is correct. There is nothing in the statutory language or the legislative history that indicates that net worth is to be calculated other than by sub-

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[5] This statement was made before EAJA was amended to apply to units of local government in 1985, but there is no reason to believe that it is inapplicable to them.

tracting total liabilities from total assets. In focusing on petitioner's "ability to pay," the district court imposed an additional requirement not set by Congress—a requirement that would force courts to engage in a time-consuming and unguided analysis of the relative "liquidity" of different types of local government assets. Petitioner's unsupported assertion (Pet. 9) that the court of appeals' ruling "as a practical matter[] renders the overwhelming majority of local governments ineligible to recover costs and fees under EAJA," even if true, is irrelevant. It is for Congress, not the courts, to set the net worth limitation for EAJA awards. If Congress desires to raise the net worth limitation above $7 million or to exclude restricted assets from the calculation of a city's net worth, it can do so. To date, however, Congress has not taken such action.[6]

2. Petitioner argues (Pet. 12) that the court of appeals erred by failing to consider adequately the "underlying agency action" in determining that the position of the United States was substantially justified. In fact, however, the court of appeals considered the agency action more comprehensively and in more detail than did either the district court or petitioner.[7]

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[6] Since EAJA is a waiver of sovereign immunity, care must be taken not to enlarge that waiver beyond a fair reading of the relevant sections of the statute. *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983).

[7] Both the district court and the court of appeals evaluated the substantial justification of the government's position under the now rejected "more than mere reasonableness" test. *Pierce* v. *Underwood*, *supra*, slip op. 10-14. Given the court of appeals' conclusion that the government's position was substantially justified under the "more than mere reasonableness" test, it follows *a fortiori* that the government was substantially justified under the proper "reasonableness" test.

The court of appeals considered—and found substantially justified—the government's action at each stage of the proceedings of this case, *i.e.*, FEMA's actions prior to the litigation, the government's pre-stipulation litigating position, and the government's post-stipulation litigating position.

Petitioner's view is that the government's position was not substantially justified because there were some errors in the FIS. As the court of appeals correctly determined, however, the proper inquiry is broader; a court should not examine one issue—such as the accuracy of the FIS—in isolation. Rather, a court should examine the government's overall position at each stage of the controversy between petitioner and the government and ask whether the government's position at each stage, taken as a whole, was substantially justified. In any event, the accuracy of the FIS would not even have been before the court except for the stipulation entered into by the government, because petitioner failed to comply with the statutory time limit for challenging the study. Moreover, the court of appeals also found that the government's position before the panel of arbitrators who, by the stipulation, were authorized to consider the accuracy of the FIS, was substantially justified (Pet. App. 13-14).[8] In short, the court of appeals concluded that the government's position, at each stage of the controversy, was "substantially (*i.e.*, for the most part) justified" *Pierce* v. *Underwood,* slip op. 12 n.2.

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[8] Petitioner challenged four aspects of the FIS; the arbitrators accepted a substantial portion of the government's response to those challenges. The four aspects of the FIS challenged by petitioner were (Pet. App. 13): "(1) selection and use of storm data, (2) wave height analysis, (3) use of the TTSURGE model, and (4) topography". The court of appeals correctly described the arbitrators' response to the

Petitioner asserts that the decisions on the issue of substantial justification by district courts "should be entitled to a heavy presumption of irregularity [presumably, regularity]" (Pet. 15). It is of course established that the decision of a district court on the question whether the government's position was substantially justified is entitled to deference. *Pierce* v. *Underwood,* slip op. 9. In the instant case, however, the court of appeals carefully identified the legal error that the district court made in setting the parameters for the consideration of that question: it focused too narrowly on the accuracy of the FIS. In first identifying the district court's error, and then reviewing aspects of the Government's position that the district court

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government's submissions regarding those challenges (*id.* at 13-14):

> First, the panel credited the testimony by government witnesses and determined that the government's wave height analysis was properly conducted. * * * Second, the panel adopted the conclusions of the government's witness as to pressure distribution and nineteenth century storm data. * * * Third, FEMA acknowledged that the central pressure distribution of exiting storms should differ from those of entering and alongshore storms, that proper use of storm frequencies would tend to raise flood elevations, and that errors in the FIS related to joint probability calculations should be corrected in determining new BFE's. * * * Fourth, FEMA promised to incorporate into the FIRM Riverside data supplied by [petitioner].

Thus, despite petitioner's assertion to the contrary, the court of appeals did consider FEMA's underlying action in ruling that the government's position was substantially justified. Petitioner is accordingly incorrect in asserting that there is a conflict between the court of appeals' decision and *Russell* v. *National Mediation Board,* 775 F.2d 1284, 1291 (5th Cir. 1985) ("position of the United States" for EAJA purposes includes both its litigation position and the underlying agency action).

erroneously ignored, the court of appeals exercised its proper role in reviewing the district court's determination.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Petitioner incorrectly asserts (Pet. 15) that the court of appeals' decision conflicts with *United States* v. *Estridge*, 797 F.2d 1454 (8th Cir. 1986). In that case, the court of appeals determined that the government did not identify any errors in the district court's factual findings or its application of the law. Consequently, the court of appeals declined to second-guess the district court's conclusion that the government's position was not substantially justified. Here, by contrast, the court of appeals clearly identified the error of the district court in applying the law by focusing too narrowly on only one aspect of the underlying agency action.

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